

**United States Department of Labor  
Employees' Compensation Appeals Board**

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**J.J., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Oklahoma City, OK, Employer**

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**Docket No. 07-917  
Issued: March 3, 2008**

*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

DAVID S. GERSON, Judge  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On February 20, 2007 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decisions dated April 14 and June 2, 2006 denying her an additional schedule award. She also appealed decisions dated September 25, 2006 and January 4 and February 5, 2007 denying her requests for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of the schedule award.

**ISSUES**

The issues are: (1) whether appellant has more than 15 percent impairment of both upper extremities; and (2) whether the Office properly denied her request for merit review of her claim under 5 U.S.C. § 8128.

**FACTUAL HISTORY**

On April 7, 2003 appellant, then a 44-year-old casual clerk and mail handler, filed an occupational disease claim alleging that her carpal tunnel syndrome was employment related.<sup>1</sup>

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<sup>1</sup> Appellant resigned from the employing establishment effective October 25, 2001.

The Office accepted the claim for bilateral carpal tunnel syndrome and authorized carpal tunnel surgery, which was performed on February 24, 2005.

On February 25, 2004 a physician<sup>2</sup> concluded that appellant had five percent impairment of the right upper extremity and five percent impairment of the left upper extremity using Table 16-11, page 484. Using Table 16-12, page 482, she concluded that appellant had 10 percent impairment of the right upper extremity and 10 percent impairment of the left upper extremity.

On May 28, 2004 appellant requested a schedule award and submitted a May 18, 2004 report by Dr. Gabriel M. Pitman, a treating osteopath, who reported that she had normal muscle tone, normal bilateral fine muscle movement in the hands, no pronator drift, 5/5 muscle strength in all extremities and “[s]ensation is intact to touch, pinprick, temperature and vibratory sensation in all four extremities.” A nerve conduction study revealed “[r]ight median sensory nerve action potential had prolonged distal latency with normal amplitude.” Dr. Pitman opined that appellant had electrophysiologic evidence to suggest mild right median neuropathy at the wrist as can be seen in the clinical setting of carpal tunnel syndrome.

On August 2, 2004 the Office medical adviser determined that appellant had 15 percent impairment of both the right and left upper extremities based upon the February 24, 2004 medical report. The Office medical adviser found that appellant had 10 percent impairment of each upper extremity for a Grade 4 sensory deficit, based on Table 16-10 at page 482, and Table 16-15 at page 492 (a Grade 4 sensory deficit of 25 percent multiplied by maximum sensory deficit of 39 percent for the median nerve). The Office medical adviser found that appellant had 5 percent impairment of each upper extremity for a Grade 3 motor deficit based on Table 16-11 at page 484 and Table 16-15 at page 492 (50 percent multiplied by 10 percent). He combined the 5 percent impairment for motor deficit with the 10 percent impairment for sensory deficit for 15 percent total impairment in each upper extremity.

On August 30, 2004 the Office granted appellant a schedule award for 15 percent impairment of the left upper extremity and 15 percent impairment of the right upper extremity. The period of the award was 93.6 weeks and ran from January 25 to November 10, 2005.

On August 2, 2005 Dr. Glenn L. Smith, a treating osteopath, reported decreased strength in the hand, decreased median nerve sensation and minor complaints of discomfort and pain. He reported that appellant had “a decrease in the intrinsic strength of the hand is 4-4+.” Using Table 16-15, page 492 Dr. Smith determined that appellant had 20 percent impairment for sensory deficit and 5 percent impairment for motor deficit or a total 25 percent impairment.

On November 21, 2005 the Office medical adviser reviewed the report of Dr. Smith and opined that it failed to contain descriptive information, such as subjective complaints and objective signs that supported the recommended increase. He found the report insufficient to make any impairment determination for a schedule award and recommended referring appellant for a second opinion evaluation.

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<sup>2</sup> The name on the form is illegible.

In a December 22, 2005 report, Dr. Smith noted that his August 2, 2005 report contained an impairment rating for appellant's right upper extremity only.

On March 16, 2006 Dr. Shawn Smith, a second opinion Board-certified physiatrist, determined that appellant had 15 percent impairment of the left upper extremity and 15 percent impairment of the right upper extremity. A physical examination revealed ulnar deviation of 30 degrees, dorsiflexion of 60 degrees, radial deviation of 25 degrees and palmar flexion of 70 degrees on the right and ulnar deviation of 30 degrees, dorsiflexion of 70 degrees, radial deviation of 30 degrees and palmar flexion of 80 degrees on the left. Dr. Shawn Smith reported that appellant had "a positive Finkelstein maneuver on the right hand" and "negative Tinel's sign at the wrist and elbow bilaterally." He reported appellant's grip strength was 10 kilograms on the right and 20 kilograms on the left.

On April 10, 2006 the Office medical adviser reviewed the March 16, 2006 report of Dr. Shawn Smith and found that appellant did not have greater impairment than previously awarded. The Office medical adviser noted that the March 16, 2006 report described normal sensory function and range of motion within normal limits.

By decision dated April 14, 2006, the Office denied appellant's claim for an additional schedule award. It found that the reports by Dr. Shawn Smith and the Office medical adviser did not establish greater impairment of her upper extremities than previously awarded.

On April 17, 2006 appellant requested reconsideration and referral to a second opinion physician of her choice.

By decision dated June 2, 2006, the Office denied modification of the April 14, 2006 decision.

On June 7 and 16, 2006 appellant requested reconsideration. She stated that she could not understand how the Office could accept Dr. Glenn L. Smith's initial 15 percent impairment for each upper extremity yet not accept his August 2, 2005 opinion that her permanent impairment had increased by 10 percent in each upper extremity. The Office subsequently received reports dated June 22 and July 7, 2006 by Dr. Glenn L. Smith which provided physical findings and work restrictions.

By decision dated July 21, 2006, the Office denied appellant's request for further merit review.

On July 21 and August 2, 2006 appellant again requested reconsideration and submitted reports by Dr. Glenn L. Smith dated June 22, July 7 and 21, August 4 and September 1, 2006; an August 21, 2006 report by Dr. Pitman; an August 21, 2006 electromyograph study and a July 24, 2006 report by physical therapists.

In a September 25, 2006 decision, the Office denied appellant's reconsideration request on the grounds that her request was insufficient to warrant merit review of the denial of her claim for an additional schedule award.

On October 16, 2006 the Office received appellant's September 11, 2006 request for reconsideration and reports by Dr. Glenn L. Smith dated September 1 and October 11, 2006. These reports provided physical findings and work restrictions.

On November 10 and 13, 2006 appellant requested reconsideration and submitted a November 10, 2006 report by Dr. Glenn L. Smith in support of her request. Dr. Glenn L. Smith provided physical findings and work restrictions.

By decision dated January 4, 2007, the Office denied appellant's request for further merit review.

On January 12 and 13, 2007 appellant requested reconsideration and resubmitted evidence previously considered.

By decision dated February 5, 2007, the Office denied appellant's request for a merit review.<sup>3</sup>

### **LEGAL PRECEDENT -- ISSUE 1**

Section 8107 of the Federal Employees' Compensation Act<sup>4</sup> sets forth the number of weeks of compensation to be paid for the permanent loss of use of specified members, functions and organs of the body.<sup>5</sup> The Act, however, does not specify the manner by which the percentage loss of a member, function or organ shall be determined. To ensure consistent results and equal justice for all claimants under the law, good administrative practice requires the use of uniform standards applicable to all claimants.<sup>6</sup> The American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.<sup>7</sup>

### **ANALYSIS -- ISSUE 1**

Appellant previously received schedule awards for 15 percent impairment to each upper extremity. She subsequently filed a claim for an increased schedule award. The Office denied an additional schedule award on the basis that the medical evidence did not support an increase in impairment to both upper extremities. To establish entitlement to an additional award, the medical evidence must show that impairment due to the accepted employment injuries has increased.

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<sup>3</sup> The Board notes that, following the February 7, 2007 decision, the Office received additional evidence. However, the Board may not consider new evidence on appeal. See 20 C.F.R. § 501.2(c); *Donald R. Gervasi*, 57 ECAB \_\_\_\_ (Docket No. 05-1622, issued December 21, 2005); *Rosemary A. Kayes*, 54 ECAB 373 (2003).

<sup>4</sup> 5 U.S.C. §§ 8101-8193.

<sup>5</sup> 5 U.S.C. § 8107.

<sup>6</sup> *Ausbon N. Johnson*, 50 ECAB 304 (1999).

<sup>7</sup> A.M.A., *Guides* (5<sup>th</sup> ed. 2001); 20 C.F.R. § 10.404.

In support of her request, appellant submitted reports dated August 2 and December 22, 2005 by Dr. Glenn L. Smith, a treating osteopath. On December 22, 2005 he stated that his August 2, 2005 report addressed an impairment rating for appellant's right upper extremity only. In his August 2, 2005 report, Dr. Glenn L. Smith reported decreased strength in the hand, decreased median nerve sensation and minor complaints of discomfort and pain. Using Table 16-15, page 492, he determined that appellant had 20 percent impairment for sensory deficit and 5 percent impairment for motor deficit resulting in a total 25 percent impairment. However, Dr. Glenn L. Smith did not base his provide an impairment rating on the A.M.A., *Guides*. He failed to identify the grading schemes of the A.M.A., *Guides* used in making the impairment rating. In addition, Dr. Glenn L. Smith noted in the December 22, 2005 report that the impairment rating he gave in his prior report was for the right upper extremity only. There is no other report in the record indicating 25 percent impairment of appellant's left upper extremity. Therefore, the Board finds that Dr. Glenn L. Smith's reports are of diminished probative value and insufficient to establish appellant's entitlement to an additional schedule award for her upper extremities.

The Office referred appellant to Dr. Shawn Smith for a second opinion medical evaluation. He submitted a March 16, 2006 report, in which he provided an accurate factual medical background. Dr. Shawn Smith reported that physical examination of the right upper extremity revealed 30 degrees of ulnar deviation which is the equivalent of zero percent impairment,<sup>8</sup> 60 degrees of dorsiflexion which is the equivalent of zero percent impairment,<sup>9</sup> 25 degrees of radial deviation which is the equivalent of zero percent impairment<sup>10</sup> and 70 degrees of palmar flexion which is also the equivalent of zero percent impairment.<sup>11</sup> Physical examination of the left extremity revealed 30 degrees of ulnar deviation which is the equivalent of zero percent impairment,<sup>12</sup> 70 degrees of dorsiflexion which is the equivalent of zero percent impairment,<sup>13</sup> 30 degrees of radial deviation which is the equivalent of zero percent impairment<sup>14</sup> and 80 degrees of palmar flexion which is the equivalent of zero percent impairment.<sup>15</sup> Further, the remainder of Dr. Shawn Smith's examination and diagnostic testing did not demonstrate any additional impairment of either upper extremity. He concluded, therefore, that the objective evidence did not warrant an increase in the percentage of permanent partial impairment of the right or left upper extremities.

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<sup>8</sup> A.M.A., *Guides* 469, Figure 16-31.

<sup>9</sup> *Id.* at 467, Figure 16-28.

<sup>10</sup> *Id.* at 469, Figure 16-31.

<sup>11</sup> *Supra* note 9.

<sup>12</sup> *Supra* note 10.

<sup>13</sup> *Supra* note 9.

<sup>14</sup> *Supra* note 10.

<sup>15</sup> *Supra* note 9.

On May 4, 2005 the Office medical adviser reviewed the evidence of record and found that there was no basis to warrant an increase in appellant's impairment rating.

The Board finds that the weight of the medical opinion evidence is represented by the reports of Dr. Shawn Smith, a second opinion physician and the Office medical adviser. They concluded that there was no evidence warranting an additional schedule award. Both physicians noted that there was insufficient objective evidence supporting an increased schedule award.

The Board finds that appellant submitted no rationalized medical evidence which establishes entitlement to an additional schedule award for her upper extremities causally related to her accepted bilateral carpal tunnel syndrome.

### **LEGAL PRECEDENT -- ISSUE 2**

The Act<sup>16</sup> provides that the Office may review an award for or against payment of compensation at any time on its own motion or upon application.<sup>17</sup> The employee shall exercise this right through a request to the district Office. The request, along with the supporting statements and evidence, is called the application for reconsideration.<sup>18</sup>

An employee (or representative) seeking reconsideration should send the application for reconsideration to the address as instructed by the Office in the final decision. The application for reconsideration, including all supporting documents, must be in writing and must set forth arguments and contain evidence that either: (1) shows that the Office erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by the Office; or (3) constitutes relevant and pertinent new evidence not previously considered by the Office.<sup>19</sup>

An application for reconsideration must be sent within one year of the date of the Office decision for which review is sought.<sup>20</sup> A timely request for reconsideration may be granted if the Office determines that the employee has presented evidence or argument that meets at least one of these standards. If reconsideration is granted, the case is reopened and the case is reviewed on its merits. Where the request is timely but fails to meet at least one of these standards, the Office will deny the application for reconsideration without reopening the case for a review on the merits.<sup>21</sup>

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<sup>16</sup> 5 U.S.C. § 8101 *et seq.*

<sup>17</sup> 5 U.S.C. § 8128(a). *See Tina M. Parrelli-Ball*, 57 ECAB \_\_\_\_ (Docket No. 06-121, issued June 6, 2006).

<sup>18</sup> 20 C.F.R. § 10.605.

<sup>19</sup> *Id.* at § 10.606. *See Susan A. Filkins*, 57 ECAB \_\_\_\_ (Docket No. 06-868, issued June 16, 2006).

<sup>20</sup> *Id.* at § 10.607(a). *See Joseph R. Santos*, 57 ECAB \_\_\_\_ (Docket No. 06-452, issued May 3, 2006).

<sup>21</sup> *Id.* at § 10.608(b). *See Candace A. Karkoff*, 56 ECAB 622 (2005).

## **ANALYSIS -- ISSUE 2**

Appellant requested reconsideration on June 7 and 16, July 21, August 2, November 10 and 13, 2006 and January 12 and 13, 2007. She has not shown that the Office erroneously applied or interpreted a specific point of law; she has not advanced a relevant legal argument not previously considered by the Office; and she has not constituted relevant and pertinent evidence not previously considered by the Office. The evidence appellant submitted is not pertinent to the issue on appeal. She submitted additional reports by Dr. Glenn Smith, who provided physical findings and work restrictions. However, these reports do not contain any impairment evaluation or rating. This evidence is not relevant to the underlying issue in this case which is the extent of appellant's right and left upper extremity impairment. The Board has held that the submission of evidence which does not address the particular issue involved in the case does not constitute a basis for reopening the claim.<sup>22</sup> Appellant's reconsideration request failed to show that the Office erroneously applied or interpreted a point of law nor did it advance a point of law or fact not previously considered by the Office. The Office properly refused to reopen appellant's claim for a review on the merits.

## **CONCLUSION**

The Board finds that appellant has not met her burden of proof to establish entitlement to an additional schedule award for her upper extremities. The Board further finds that the Office properly denied her request for a merit review.

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<sup>22</sup> *Johnnie B. Causey*, 57 ECAB \_\_\_\_ (Docket No. 06-49, issued February 7, 2006).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated February 5 and January 4, 2007 and September 25, June 2 and April 14, 2006 are affirmed.

Issued: March 3, 2008  
Washington, DC

David S. Gerson, Judge  
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge  
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board